Sun Yok Peng (t/a Peng Motor Repair Engine & Auto Electrical Service dan Zahir Mulia Enterprise) v Sun Leong Pin

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–199 OF 1998
KN SEGARA J
30 JUNE 2004

Tort — Deceit — Fraud — Breach of trust or duty in relation to company — Mandate to issue cheques — Withdrawal of moneys through issuance of cheques in own name — Whether reasons for withdrawal fraudulent — Whether tantamount to breach of trust — Whether sum withdrawn to be returned — Whether counter claim proven

The plaintiff was the sole-proprietor of Peng Motor Repair Engine & Auto Electrical Service ('Peng Motor'). The defendant was the younger brother of the plaintiff, and worked with him until he started his own business known as Syarikat Pin Auto Engine Repair & Electrical Service ('Pin Auto'), in the same premises. The defendant was given a mandate by the plaintiff to issue cheques on behalf of Peng Motor. The defendant had withdrawn RM70,000 from Peng Motor's account to his name. The plaintiff filed this claim against the defendant for breach of trust arising from the said withdrawal. The defendant counterclaimed for RM4,000 allegedly taken by the plaintiff.

The issues raised were, (i) whether the plaintiff was entitled to claim the said RM70,000; and (ii) whether the plaintiff was liable to the defendant for the said RM4,000.

Held, allowing plaintiff's claim with costs and dismissing defendant's counterclaim with costs:

(1) Evidence proved that the defendant was not a truthful witness and his credibility on material particulars was wholly unreliable in light of various contradictions and inconsistencies in his testimony (see para 11).

(2) It is hard to believe that the plaintiff issued another cheque for RM70,000 from account No 504067-0059-5 in substitution for a new cheque under the defendant's name and the defendant was forced to sign the same. Such conduct by the plaintiff defies imagination and was against all probabilities (see para 12).

(3) The defendant had acted in breach of trust when he signed the cheque in issue, as agent of the plaintiff's firm and, had the moneys transferred to his personal account. As the trusted employee and brother of the plaintiff, the plaintiff gave the defendant the mandate to sign cheques on behalf of Peng Motor for its business purposes only. The defendant had acted against all good conscience and dishonestly and had breached his obligations as a fiduciary in issuing a cheque in his own name for the sum of RM70,000 for purposes unrelated to Peng Motor's business and, for an amount in excess of the orally authorized limit given by the plaintiff (see para 17).

(4) On the counterclaim, there was no evidence that the defendant had in fact possession of such an amount in cash, other than for his bare assertion that it was his earnings from his business. Even if the defendant had such a large sum of money in cash belonging to him kept in the said premises, there was no evidence that the plaintiff had taken the same (see para 18).

[**Bahasa Malaysia summary**

Plaintif adalah pemilik tunggal Peng Motor Repair Engine & Auto Electrical Service ('Peng Motor'). Defendan adalah adik kepada plaintif dan bekerja dengannya sehingga dia memulakan perniagaannya sendiri yang dikenali sebagai Syarikat Pin Auto Engine Repair & Electrical Service ('Pin Auto'), di premis yang sama. Plaintif telah memberikan mandat kepada defendan untuk mengeluarkan cek bagi pihak Peng Motor. Defendan telah mengeluarkan RM70,000 dari akaun Peng Motor atas namanya. Plaintif telah memfailkan tindakan ini atas alasan pecah amanah terhadap defendan yang timbul daripada pengeluaran RM70,000 tersebut. Defendan telah memfailkan tuntutan balas terhadap plaintif untuk jumlah RM4,000, yang kononnya telah diambil olehnya.

Isu-isu yang dibangkitkan adalah: (a) sama ada plaintif berhak menuntut RM70,000 berkenaan; dan (b) sama ada plaintif bertanggungan kepada defendan untuk jumlah RM4,000 berkenaan.

Diputuskan, membenarkan tuntutan plaintiff dengan kos dan menolak tuntutan defendan dengan kos:

(1) Setelah pemeriksaan rapi terhadap kesemua keterangan yang dikemukakan, termasuk keterangan dokumen dan lisan, defendan tidak dianggap sebagai satu saksi yang bercakap benar, kredibilitinya di atas butir-butir material keseluruhannya tidak dapat dipercayai berdasarkan kepada penyangkalan dan tiada kesamaan yang menerus dalam keterangannya (lihat perenggan 11).

(2) Adalah mustahil untuk dipercayai bahawa plaintif telah mengeluarkan cek yang lain berjumlah RM70,000 daripada akaun No 504067-0059-5 menggantikan cek yang baru di bawah nama defendan dan defendan telah dipaksa untuk menandatangani cek tersebut. Kelakuan sedemikian oleh plaintif melampui imaginasi dan bertentangan dengan semua kebarangkalian (lihat perenggan 12).

(3) Defendan telah pecah amanah apabila defendan menandatangani cek berkenaan dalam tindakan ini, sebagai agen firma plaintif dan kemudiannya memindahkan jumlah wang tersebut ke dalam akaun peribadinya. Sebagai pekerja yang dipercayai dan adik kepada plaintif, plaintif telah memberikan mandat kepada defendan untuk menandatangani cek bagi pihak Peng Motor untuk tujuan perniagaan Peng Motor sahaja. Defendan telah bertindak bertentangan dengan semua suara hati baik dan secara tidak jujur telah melanggar obligasi fidusiarinya dalam mengeluarkan cek ke atas namanya sendiri untuk jumlah RM70,000

bagi tujuan yang tidak berkaitan dengan perniagaan Peng Motor, dan untuk jumlah yang melebihi had kebenaran lisan yang diberikan oleh plaintif (lihat perenggan 17).

(4) Berdasarkan tuntutan balas, tidak terdapat sebarang keterangan bahawa defendan sememangnya memiliki jumlah tunai tersebut, melainkan penegasan kosong bahawa jumlah tersebut adalah pendapatan dari perniagaannya. Sungguhpun defendan mempunyai jumlah wang tunai yang besar miliknya yang disimpan di dalam premis tersebut, tidak terdapat sebarang keterangan bahawa plaintif telah mengambil wang tersebut (lihat perenggan 18).]

Notes

For cases on deceit generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 224–229.

Avatar Singh (Mohd Latip & Assoc) for the plaintiff.
CH Lee (Lee & Yong) for the defendant.

KN Segara J:

[1] The plaintiff is the sole proprietor of a firm carrying on business known as Peng Motor Repair Engine & Auto Electrical Service ('the said firm'). The business was registered on 21 February 1987 and the said firm carried out its business at No 11 Jalan Suria 4, Taman Malim Jaya, Melaka. The defendant is the younger brother of the plaintiff, and worked with the plaintiff until August 1997, when he started his own business known as Syarikat Pin Auto Engine Repair & Electrical Service, at the same premises the plaintiff had carried on his business, upon plaintiff terminating his tenancy of the said premises.

[2] Counsel for plaintiff and the defendant have agreed that there are only two issues to be determined by the court, namely:

(1) whether the plaintiff is entitled to the RM70,000, which was withdrawn by the defendant from the said firm's account No 504067-0059-5, at Malayan Banking Berhad, Taman Malim Jaya, on 24 July 1997;

(2) in the counterclaim, whether the plaintiff is liable to the defendant for the sum of RM4,000, allegedly taken by the plaintiff from the defendant's workshop.

[3] The plaintiff had opened a current account No 504067-0059-5, at Malayan Banking Berhad, Taman Malim Jaya branch, in the name of the said firm, for his business purposes. The defendant was given a mandate by the plaintiff to issue cheques on behalf of the said firm (see exh P8). Exhibit P8 appears to be a bank document — it is an authority to the bank, given by the plaintiff, to honour all cheques drawn on the said account by the authorized person named therein, that is, the defendant. The said mandate was given in 1996 and has not been revoked. The plaintiff testified, *inter alia*:

Untuk menguruskan perniagaan Peng Motor saya ada membuka satu akaun semasa di MBB Taman Malim Jaya. Nombor akaun 504067-0059-5. Saya ada memberi satu mandat bank kepada defendan untuk menguruskan akaun tersebut tujuan perniagaan saya.

Defendan bersama-sama saya ke bank untuk menandatangan bersama-sama saya. Saya menandatangani mandat ini pada tahun 1996.

Saya ada memberitahu defendan pada 1996 semasa saya menandatangan mandat tersebut bahawa beliau hanya boleh mengeluarkan wang setakat RM10,000 sahaja iaitu had sekeping cek setakat RM10,000.

Saya memilih defendan untuk memberi mandat ini oleh kerana beliau adalah adik saya. Saya percaya kepada beliau.

Tujuan saya memberi mandat ialah saya ingin perniagaan saya berjalan dengan lancar semasa saya pergi outstation. Saya telah membuka akaun ini lebih awal iaitu pada tahun 1993 atau 1994 — apabila cawangan bank Malayan Banking Berhad memulakan perniagaan di sana.

Sebelum 24 Julai 1997, defendan tidak pernah menandatangani apa-apa cek melebihi RM10,000.

Pada bulan lapan tahun 1997, saya dapat tahu bahawa defendan telah mengeluarkan cek melebihi RM10,000 apabila saya terima statement bagi bulan Julai 1997. Dia telah mengeluarkan satu cek sebanyak RM70,000 pada 24 Julai 1997 atas nama sendiri.

Nombor cek ialah 081135 bertarikh 24 Julai 1997 dari akaun Peng Motor Repair Engine & Auto Electrical Service.

Saya tidak berhutang kepada defendan.

Saya tidak berhutang kepada bapa atau ibu saya.

Saya tidak berhutang kepada sesiapa pun jumlah sebanyak RM70,000 itu.

… Saya rasa marah dan hilang kepercayaan pada adik saya iaitu defendan. Saya terus bincang dengan defendan dan minta beliau pulangkan wang RM70,000 balik kepada akaun perniagaan saya. Dia minta saya pergi bincang dengan ibubapa saya.

Saya ada pergi berjumpa ibubapa saya. Saya tidak dapat menyelesaikan … .

Semasa saya bincang dengan ibubapa saya seperti diarahkan oleh defendan ibubapa saya tidak memberitahu saya bahawa saya berhutang kepada mereka (iaitu ibubapa).

[4] The plaintiff's cause of action against the defendant for the sum of RM70,000 is based on a breach of trust. The plaintiff pleaded, *inter alia*, as follows:

3(a) Di atas dasar kepercayaan, maka Plaintiff telah memberi kebenaran kepada Defendan untuk menandatangani segala cek-cek untuk Syarikat Peng Motor Repair Engine & Auto Electrical Service yang mana cek-cek tersebut harus dan hanya digunakan untuk tujuan perniagaan Plaintiff sahaja secara spesifik.

(b) Plaintif memberi kebenaran sedemikian kepada Defendan (iaitu adik beliau), kerana plaintif harus berada di kawasan luar daripada Negeri Melaka untuk perniagaan untuk beberapa hari dari masa ke masa dan sekaligus Plaintif tidak mahu urusan perniagaan beliau terbantut.

(c) Pada tanggal 24 Julai 1997, Defendan tanpa kebenaran rasmi/persetujuan Plaintiff telah mengeluarkan wang tunai sebanyak RM70,000 sahaja daripada akaun Syarikat Plaintif tersebut untuk tujuan kegunaan persendirian beliau. Butir-butir cek tersebut ialah Cek MBB No 081135, yang bertarikh 24 Julai 1997 (kemudian daripada ini disebut sebagai 'Cek tersebut').

(d) Perbuatan Defendan sedemikian telah melanggar dasar kepercayaan Plaintif terhadap Defendan dan sekaligus ia merupakan suatu perbuatan yang tidak bertanggungjawab langsung, memecah amanah serta menyalahi di sisi lunas undang-undang.

Butir-butir Pecah Amanah:

(a) Tanpa kebenaran dan/atau persetujuan Plaintif, mengeluarkan wang Plaintif untuk kegunaan persendirian.

(b) Menyalahgunakan kuasa yang diberi oleh Plaintif kepada Defendan.

[5] With reference to the cheque and RM70,000 the defendant pleaded in his statement of defence, *inter alia*, as follows:

3(a) …

(b) Plaintif memberi Defendan sekeping cek pada bulan Julai 1997 untuk jumlah RM70,000 tetapi oleh kerana akaun semasa di Malayan Banking Berhad, Malim Jaya tidak mempunyai wang yang cukup, Plaintif mengeluarkan cek yang baru dan memberitahu Defendan untuk menandatangani sendiri kerana tandatangan seorang adalah sah seperti yang dinyatakan dalam mandat tersebut.

(c) Jumlah sebanyak RM70,000 telah dikeluarkan daripada bank tersebut dan diberikan kepada ibubapa Plaintif dan Defendan. Jumlah RM70,000 tersebut dianggap bayaran balik modal oleh kerana ibubapa mereka telah membayar untuk perniagaan atas nama Peng Motor Repair Engine & Auto Electrical Service.

(d) …

(e) …

4 …

(a) …

(b) Jumlah RM70,000 tersebut dianggap sebagai bayaran balik kepada ibubapa Plaintif dan Defendan pada 24 Julai 1997 oleh kerana Plaintif telah dapat pertolongan secara kewangan pada permulaan perniagaan Plaintif yang termasuk Peng Motor Repair Engine & Auto Electrical Service selepas penamatan perniagaan Plaintif dalam Peng Motor Repair Engine & Auto Electrical Service di premis No 11, Jalan Suria 4, Malim Jaya, 75250 Melaka (selepas ini dipanggil premis tersebut) pada 1 Julai 1997.

[6] In short, the defendant contends that the sum of RM70,000 was withdrawn from the said firm's bank account for repayment of capital allegedly advanced by the parents to the plaintiff when he started his business. The defendant further contends that the said sum was handed over to the parents.

[7] On the evidence adduced before me, I am unable to make a finding that the parents had advanced a sum of RM70,000 or, any other sum, to the plaintiff, as capital for his business in the said firm, as alleged by the defendant. Unfortunately, the parents are not alive to testify either on behalf of the plaintiff or the defendant. On the balance of probabilities, I accept the evidence of the plaintiff that he started the business with a capital of RM8,000, from his own savings.

[8] Apart from the bare assertion of the defendant (DW1) and, his brother (DW4), there is no evidence of the alleged loan by the parents to the plaintiff. There is even uncertainty as to the amount of the alleged loan and when it was disbursed to the plaintiff by the parents. In para 3(c) of the statement of defence the defendant had pleaded the loan was RM70,000 but, the defendant testified in court, the loan was RM60,000 and, paid in three instalments by the parents, when the plaintiff started his business in 1987, whereas DW4 testified the loan was disbursed in 1978. The defendant further testified that the loan had been paid back to the parents on 24 July 1997, by a cheque for RM70,000 issued by Sun Man Pin to their parents. He also testified that they paid an excess of RM10,000, on the sum of RM60,000 borrowed, by agreement amongst the brothers. Sun Man Pin was neither called as a witness to testify that he had issued a cheque for RM70,000, on 24 July 1997, to the parents nor was any evidence adduced of the agreement by all the brothers to pay the extra RM10,000 for the alleged RM60,000 loan. DW1 testified in examination-in-chief, *inter alia*, as follows:

> Wang sebanyak RM70,000 telah dikembalikan kepada ibubapa kami pada 24Julai 1997 melalui cek.
>
> Kami bayar RM10,000 lebih daripada modal yang dipinjam (RM60,000) atas persetujuan di antara adik beradik kami.
>
> Sun Man Pin mengeluarkan satu keping cek untuk RM70,000 kepada ibubapa kami.

[9] Under cross-examination, the defendant testified, *inter alia*:

> I am aware that bank account No 504067-0059-5 in the name of Peng Motor Repair Engine & Auto Electrical Service was to be operated only for the purpose of the business. This account was opened by the plaintiff and I was given a mandate (P8) to sign cheques on behalf of the business.
>
> I did say in my evidence-in-chief that the plaintiff owed my father RM60,000 and as a gesture of goodwill the plaintiff gave an extra RM10,000 when returning the money owed.
>
> I was instructed by the plaintiff to issue a cheque under the name of Peng Motor and the cheque was put into my personal account and he had instructed me to issue my personal cheque to my father and mother. With the cheque given by me my father and mother went to Southern Bank to open a new account under the name of my father and mother. They opened one account in their joint names.
>
> The plaintiff wrote the cheque in my name for RM70,000.
>
> Initially the plaintiff issued one cheque in my name for RM70,000 from a different account and both of us signed the cheque. However, this cheque was not cleared as there was insufficient funds in that account. That was also Peng Motor's account. Subsequently the plaintiff issued another cheque in my name from account 504067-00059-5 and forced me to sign, I asked why he didn't sign, he said my signature alone is good enough.

[10] The cheque in issue is exh P9 (Bundle B p 9). The defendant testified, in cross-examination, with reference to this cheque, as follows:

I do not know who wrote the date 24 July 1997 on this cheque.

I signed this cheque and I was forced to sign this cheque.

I do not know who wrote 'Mr Sun Leong Pin I/C A0809990' on the cheque.

I do not know who wrote the words 'Seventy Thousand Only'.

I do not know who wrote the figure '70,000' in the said cheque.

…

When I was forced to sign the cheque was already filled up but I do not know who filled up the cheque.

…

I agree that the sum RM70,000 I withdrew was deposited into my account as per exhibit D5.

I agree as per exhibit D5 I withdrew the RM70,000 by two cheques one for RM25,000 and another for RM45,000 on 30 July 1997.

[11] I do not consider the defendant to be a truthful witness and, his credibility on material particulars, is wholly unreliable, in the light of the various contradictions and inconsistency in his testimony, upon a scrutiny of all the evidence adduced in this case, both documentary and oral.

[12] Initially, the defendant claimed that the plaintiff had issued one cheque in his name for RM70,000 (alluding to exh D4 — Bundle C1 p 4) which was signed by both the defendant and the plaintiff but from a different account. The defendant claimed the cheque was not cleared because there was insufficient funds. Yet, there was no evidence the cheque was not cleared because there was insufficient funds. There was no evidence that the defendant had been given a mandate to sign this cheque from the said account, like the mandate exh P8, for the account from which cheque exh P9 was issued. Had the defendant realized this on 24 July 1997 and, thereupon substituted exh D4 with exh P9? It is hard to believe that the plaintiff issued another cheque for RM70,000 from account 504067-0059-5 in substitution for D4 and the defendant forced to sign same. Such conduct by the plaintiff defies imagination and is against all probabilities.

[13] The cheque book from which D4 was issued was produced by plaintiff and marked as PI. The book was for cheques No 014651 to No 014700.

[14] The plaintiff testified about this cheque book (PI) and cheque (D4) in examination-in-chief, as follows:

PI selalu disimpan dalam laci saya di pejabat. Selain daripada saya adik saya Sun Leong Pin (defendan) juga mempunyai kunci laci tersebut.

Sun Leong Pin tidak ada kuasa untuk tandatangan cek-cek dalam PI.

…

Cek ini adalah dari buku cek PI. Saya yang tulis nama pembayar iaitu 'Mr Sun Leong Pin IC A0809990'.

…

Saya telah isi nama 'Mr Sun Leong Pin 1C A080990' oleh kerana buka satu akaun di Malayan Bank atas nama persendirian dia. Saya tidak isi jumlah dan tarikh kerana tiada masa untuk pergi bank untuk buka akaun.

Saya tidak boleh ingat tarikh saya telah tulis nama 'Mr Sun Leong Pin' atas cek 014656 – mungkin antara tarikh 30 April 1996 dan 6 Mei 1996.

…

Saya hanya sedar bahawa cek 014656 tidak ada dalam buku cek PI pada 17Disember 1998. Cek tersebut telah dikemukakan sebagai eksibit oleh Sun Leong Pin di dalam affidavit beliau bertarikh 17 Disember 1998 dalam kes ini di dalam Saman Dalam Kamar bertarikh 20 November 1998 (kandungan 6).

[15] Under cross-examination the plaintiff testified, *inter alia*, about the cheque D4:

Cek ini untuk tahun 1996. Tulisan nama penerimaan dan tandatangan saya dibuat dalam tahun 1996. Tarikh dan amaunnya bukan tulisan saya. Lagipun tarikh cek ini ialah dalam tahun 1997.

[16] On a balance of probabilities, on the evidence, I find that exh D4 was never issued by the plaintiff on 24 July 1997. His evidence, that he had signed the undated cheque leaf No 014656 without the amount filled sometime between 30 April 1996 and 6 May 1996, is consistent with the truth, upon examining carefully the cheque book PI. Obviously, the said cheque leaf had gone missing and surfaced again on 24 July 1997 when the defendant added his signature as a co-signatory and, filled up the blanks with respect to the amount and the date. The irresistible inference is that upon realizing the cheque was invalid, because he was not authorised to sign cheques from this account, he immediately caused to issue cheque P9 and, signed same on the strength of the mandate P8.

[17] The cheque, P9, clearly shows that the cheque was written in favour of the defendant for a sum of RM70,000 and signed personally by him. His testimony that he was forced to sign and, that the moneys were given to his parents, is unsupported by any credible evidence. The defendant has acted in breach of trust when he signed P9, as agent of the plaintiff's firm and, had the moneys transferred to his personal account. As the trusted employee and brother of the plaintiff, the plaintiff gave the defendant the mandate to sign cheques on behalf of the said firm for its business purposes only, from account No 5000595. The defendant has acted against all good conscience and dishonestly. He has breached his obligations as a fiduciary in issuing a cheque in his own name for the sum of RM70,000 for purposes unrelated to the said firm's business and, for an amount in excess of the orally authorized limit (RM10,000) given by the plaintiff. Even if there was a debt of RM70,000 outstanding from the plaintiff to his parents, the defendant has no business to arrogate to himself the right to set it off from the said firm's account. The defendant has clearly committed a breach of trust. Therefore, the defendant shall be ordered to account for the sum of RM70,000 to the plaintiff, by returning same to the plaintiff together with interest at the rate of 4%pa from 24 July 1997 till date of judgment and, at 8%pa thereafter, until payment. The plaintiff shall also be entitled to the costs herein.

[18] On the counterclaim for the sum of RM4,000, belonging to the defendant, allegedly taken by the plaintiff when he entered the premises to remove his belongings, after he had ceased his business towards the end of July 1997, there is no evidence that the defendant had in fact possession of such an amount in cash, other than for his bare assertion that it was his earnings from his business. Even if the defendant had such a large sum of money in cash belonging to him kept in the said premises, there is no evidence that the plaintiff had taken the same. In the circumstances, the plaintiff is not liable to the defendant for the said sum of RM4,000.

[19] There shall be judgment for the plaintiff in the sum of RM70,000 together with interest and costs. The defendant's counterclaim is dismissed with costs.

Plaintiff's claim allowed with costs and defendant's counterclaim dismissed with costs.

Reported by Sugandra Rao